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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

AMANDA FRLEKIN, AARON  
GREGOROFF, SETH DOWLING,  
DEBRA SPEICHER; AND TAYLOR  
KALIN,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Case No. 13cv03451 WHA

**DEFENDANT APPLE INC.'S  
OPPOSITION TO PLAINTIFFS' MOTION  
FOR RULE 23(C)(4) CERTIFICATION OF  
PARTICULAR ISSUES**

Date: July 2, 2015

Time: 8:00 a.m.

Judge: Hon. William H. Alsup

Courtroom: 8

Trial Date: September 14, 2015

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1 **I. INTRODUCTION**

2 Plaintiffs Amanda Frlekin, Aaron Gregoroff, Seth Dowling, Debra Speicher, and Taylor  
3 Kalin ask this Court to certify their theory that Defendant Apple Inc. (“Apple”) has an unlawful  
4 policy of requiring employees to participate in bag and technology checks without compensation.  
5 Notably, Plaintiffs admit in their class certification motion that there is no systemic bag or  
6 technology check practice across the class. Specifically, they admit: “(i) not every Apple Employee  
7 brings a bag or Apple product to work every day; (ii) not every Apple Employee goes through a  
8 Check each time he or she exists a California Store; (iii) there are times when some California Stores  
9 do not conduct checks; and (iv) the Checks sometimes take less than a minute in duration and  
10 sometimes more.” (Pl. Motion, 1:24-2:4.)

11 Accordingly, Plaintiffs’ theory is not certifiable for the reasons cited in this Court’s summary  
12 judgment ruling: “[t]he record in this action . . . involves many varying fact patterns and lends itself  
13 to a myriad of different interpretations of Apple’s policy and practice regarding when an employee is  
14 required to undergo a security screening.” (May 30, 2014 Order, 5:9-12 (emphasis added).)  
15 Assuming for argument that the time at issue is even compensable (which Apple denies),<sup>1</sup>  
16 overwhelming evidence confirms this Court’s prior finding that key issues of liability, including  
17 whether employees brought bags, what employees carried in their bags (*i.e.*, items of convenience or  
18 a life necessity), whether checks took place, and, if so, how long the checks took, vary substantially  
19 by store, by employee, and by day.

20 Indeed, Plaintiffs’ motion for certification of “issues” is fundamentally flawed because  
21 Plaintiffs make no attempt to satisfy Rule 23(b)’s predominance requirement. Instead, Plaintiffs try  
22 to sidestep the myriad individual questions that determine potential liability for their off-the-clock  
23 claim by asking this Court to certify “particular issues” under Rule 23(c)(4). Substantial precedent,  
24 including from the United States Supreme Court and Ninth Circuit, confirms Plaintiffs may  
25 prosecute a class action only if they can satisfy Rules 23(a) and 23(b) to certify a class, and also  
26 confirms that Rule 23(c)(4) does not provide an independent basis to certify a class action.

27 Further, Plaintiffs’ proposed trial plan is fatally flawed. First, Federal Rule 53 confirms that

28 <sup>1</sup> See Apple’s Motion for Summary Judgment, Dkt. No. 156.

special masters may not be used in the manner proposed by Plaintiffs here. Second, as explained by the Supreme Court, “[w]hat matters to class certification . . . is not the raising of common ‘questions’ – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis added). Plaintiffs’ five “common questions” that purportedly relate to Apple’s liability for bag checks and technology checks do not generate common answers and, in any event, do not answer the question of Apple’s liability. Plaintiffs’ bag check and technology check theories would require more than 12,000 mini-trials to adjudicate individualized issues of liability for each putative class member. For instance:

- Many employees did not bring bags or personal Apple technology to work, and substantial evidence confirms that those employees did not go through a check. If an employee did not have a bag or Apple personal technology, and therefore did not have a check, the policy cannot create liability as to that employee;
- Many stores did not conduct bag or technology checks at all, or did so rarely, at different times throughout the relevant time period. If no checks were conducted when an employee left the store, the policy cannot create any liability as to that employee;
- To the extent Plaintiffs claim putative class members were required to bring a bag to work as a “necessity of life,” there is no way to determine on a class-wide basis whether an employee brought a bag to work for personal convenience or to transport a disability accommodation, “necessary” medication, or feminine hygiene products;
- Even when a check occurred, there is no way to determine on a class-wide basis whether the check took more than a *de minimis* amount of time, and video evidence establishes checks averaged well less than 10 seconds per employee; and
- When a check occurred, whether an employee was or could have been on-the-clock varied.

In short, because there are no common answers to the liability questions posed by Plaintiffs’ bag and technology check claim, Plaintiffs cannot satisfy the requirements for class certification under Rule 23(a) and Rule 23(b). And, because Plaintiffs cannot satisfy Rule 23(a) and Rule 23(b), Plaintiffs cannot certify a “particular issue” under Rule 23(c)(4).

## II. STATEMENT OF RELEVANT FACTS

### A. Apple Does Not Require Employees To Bring Bags Or Personal Apple Technology

Substantial evidence confirms Apple does not require employees to bring bags or personal Apple technology to work, and that neither bags nor personal Apple technology are “life necessities” for all Apple employees.<sup>2</sup> Indeed, Plaintiffs admit that Apple employees do not bring bags or Apple devices to work every day. (Pl. Motion, 5:5-6.) Moreover, Dr. Randolph W. Hall analyzed video footage of 399 employees departing the San Francisco store, where Plaintiff Kalin formerly worked. Dr. Hall observed that 49% of the employees left the store without carrying any observable bag or personal technology, thus proving that neither Apple nor life circumstances require all employees to carry a bag or to bring personal Apple technology to work. (Ex. GG, p. 2.)<sup>3</sup> Furthermore, many Apple employees confirmed they do not bring bags or Apple devices to work, or do not do so every day. (E.g., Ex. A-3, ¶ 7 (“I have never brought a bag with me to work at Apple.”); Ex. A-24, ¶ 5 (“I rarely bring a bag to work.”); Ex. A-19, ¶ 8 (“In over three years of working at Apple, I have brought a bag to work on only two to three occasions when I brought my school backpack to work so that I could do schoolwork during my lunch break.”); Ex. A-1, ¶ 13; Ex. A-23, ¶ 4; Ex. A-20, ¶ 4; Ex. OO, at p. 224:3-11; Ex. A-27, ¶ 6; Ex. A-8, ¶ 11; Ex. A-21, ¶ 4; Ex. A-39, ¶ 5, 11; Ex. A-22, ¶ 5; Ex. PP, at p. 81:17-24; Ex. A-10, ¶ 8; Ex. A-24, ¶ 6; Ex. A-30 ¶ 3; Ex. A-9, ¶ 15.)

Notably, Plaintiffs no longer contend that Apple requires employees to bring personal Apple technology to work.<sup>4</sup> Plaintiffs’ contention that Apple effectively requires “many” employees to bring bags to work by requiring them to wear t-shirts and lanyards at work (Pl. Motion, 4:2-14) is negated by substantial evidence. Plaintiffs incorrectly assert that employees may not wear their Apple shirts outside stores. (Pl. Motion, 4:8-9.) The written policy permits employees to wear their

<sup>2</sup> All Exhibits are attached to the Declaration of Todd K. Boyer filed herewith (“Boyer Decl.”). References to exhibits are denoted “Ex. \_\_\_ [bates number].” References to deposition transcripts are denoted as “Ex. \_\_\_ at (page number).” References to Declarations are denoted as “Ex. \_\_\_ ¶ \_\_\_.”

<sup>3</sup> Dr. Hall analyzed six hours of video footage of the busiest time intervals of the busiest days at the San Francisco store. (Ex. GG, p. 2.) Apple produced this video in the course of discovery, Boyer Decl., ¶¶ 29-39). Declarations were produced by Apple on a rolling basis. (Boyer Decl. ¶¶ 5-23.)

<sup>4</sup> Apple also submits substantial evidence confirming this fact. *See* Boyer Decl., Exs. A and B., including e.g., Exs. A-1, ¶ 14; A-8, ¶ 19; A-13, ¶ 15; A-29, ¶ 14; Ex. B-1, ¶ 50; Ex. B-4, ¶ 45-46.)

1 t-shirts while traveling to and from work. Apple simply asks employees to “[b]e sure to cover up  
2 when traveling to and from work.” (Ex. CCC (Dkt. No. 156-1), ¶ 6, Ex. A thereto, APL 2435  
3 (emphasis added); *see also*, Ex. A-29, ¶ 15 (“We are not allowed to wear our Apple t-shirts in  
4 public, so I cover mine with another shirt when I come and go from work. When we had the  
5 lanyards, I used to just wear it as well under my shirt so that it was not visible.”); Ex. A-3, ¶ 6; Ex.  
6 A-16,, ¶ 10; Ex. QQ., at p. 97:16-98:8; Ex. A-15, ¶ 20; Ex. A-39, ¶ 5; Ex. A-10, ¶ 8; Ex. A-32, ¶ 9.)  
7 Alternatively, employees may hand-carry their t-shirts and lanyards. (*E.g.*, Ex. A-4, ¶ 8; Ex. A-2, ¶  
8 5; Ex. A-21, ¶ 5; Ex. A-7, ¶ 4; E. A-19, ¶ 7; Ex. B-15, ¶ 38.) Indeed, some stores also have spare  
9 shirts for employees to use. (Ex. RR at p., 147:12-20 (“Q. Does Apple have spares in the store if  
10 somebody doesn’t have their shirt for whatever reason? A. Yes.”).)

11 In addition, extensive evidence, including non-manager declarations, establishes that many  
12 Apple employees do not use a bag to carry t-shirts and/or lanyards to work. (*E.g.*, Ex. A-15, ¶ 19, 20;  
13 Ex. A-16, ¶ 10; Ex. A-23, ¶ 4; Ex. A-17, ¶ 7; Ex. A-11, ¶ 8; Ex. A-19, ¶ 9; Ex. A-32, ¶ 9; Ex. A-34,  
14 ¶ 4; Ex. A-29 ¶ 15; Ex. A-33, ¶ 14; Ex. A-35, ¶ 8; Ex. A-20, ¶ 5; Ex. A-2, ¶ 5; Ex. A-21, ¶ 7; Ex. B-2,  
15 ¶ 46; Ex. B-15, ¶ 34; Ex. B-12, Sec. Bag And Personal Technology Checks ¶ 7; Ex. B-1, ¶ 42; Ex.  
16 B-9, ¶ 44, Ex. B-16, ¶ 34, Ex. B-11, ¶ 53, Ex. B-10, ¶ 36; Ex. B-5 ¶ 27; Ex. B-6 ¶ 21; Ex. B-13 ¶ 15;  
17 Ex. B-8 ¶ 54; Ex. B-7, ¶ 19; Shalov Decl., Ex. 26 ¶ 4; *see also* Ex. PP, p. at 33:12-15, 33:23-34:1.)

18 Finally, this testimony is further supported by Dr. Hall’s observation that 49% of employees  
19 left the San Francisco store during his observation period without a bag, which means they did not  
20 need a bag to carry a t-shirt or lanyard. (Ex. GG, p. 2.) Video evidence already in the record also  
21 shows employees in the San Francisco store hand-carrying or covering-up t-shirts. (*See* Dkt. No.  
22 161-1 (Declaration of Steve Smith, Ex. A.))

### 23 **B. Employees Without Bags Or Personal Devices Were Not Searched**

24 The plain language of the bag and technology check policies confirms that only bags and  
25 Apple devices – not people themselves – are subject to search. (Ex. CCC., and Ex. A thereto “[A]ll  
26 employees, including managers and Market Support employees, are subject to personal package and  
27 bag searches.”); *see also* Boyer Decl., Ex. DDD.) Thus, employees do not participate in bag or  
28 technology checks if they do not have a bag or personal Apple technology. (*E.g.*, Ex. A-22, ¶ 5

1 (“When I didn't bring a bag to work, I didn't have to undergo bag checks and I just walked out of the  
 2 store after clocking out.”); Ex. A-26, ¶ 11 (“On days when I did not bring a bag into the store, I did  
 3 not have to undergo a bag or personal technology check.”); Ex. A-31, ¶ 7 (“Since I do not bring a  
 4 bag to work at Apple, I have never been through a bag check.”); Ex. A-18, ¶ 4; Ex. A-8, ¶ 15; Ex. B-  
 5 7, ¶ 22; Ex. SS, at p. 91:25-92:3; Ex. A-17, ¶ 12; Ex. A-15, ¶ 15; Ex. B-15, ¶ 49, Ex. B-9, ¶ 54; Ex.  
 6 B-8, ¶ 49; Ex. B-12, Sec. Bag and Personal Technology Checks ¶ 15; Ex. B-16, ¶¶ 31, 49; Shalov  
 7 Decl., Ex. 25, ¶ 5; Boyer Decl., Ex. AAA, at p. 59:12–17; Ex. TT, at p. 51:24-52:4.)

### 8 C. Bag And Personal Apple Technology Check Practices Vary Across Stores

9 Plaintiffs claim “Apple has a written policy that ‘all’ employees ‘must’ have their bags  
 10 searched and personal technology checked ‘every time’ they leave the store,” (Pl. Mot., 1:9-10), but  
 11 then admit on the very next page that “(ii) not every Apple employee goes through a Check each  
 12 time he or she exits a California Store; [and] (iii) there are times when some California Stores do not  
 13 conduct checks,” (Pl. Mot., 2:1-3). Thus, Plaintiffs admit that even if an employee brought a bag or  
 14 Apple device to work, Apple's bag and technology check policies did not require a check of all  
 15 employees' bags or devices every time they left the store.

16 Carol Monkowski, Apple's person most knowledgeable about Apple's bag check policy,  
 17 testified that Apple empowers Store Leaders to decide whether and to what extent to implement the  
 18 bag check policy. (Ex. UU, at p. 91:6-93:9.) Paul Benjamin, Apple's Director of Loss Prevention,  
 19 testified: “ultimately bag checks are at the discretion of the store leadership.” (Ex. VV, at p. 81:11-  
 20 14, *see also* pp. 81:15-82:15.) And Dr. Hall's video analysis confirms that practices vary by store.  
 21 Based on the video he reviewed: the San Francisco store conducted checks with a dedicated security  
 22 guard at a separate employee exit; the Century City store and The Grove store did not conduct  
 23 checks; and only five bag checks (and no technology checks) occurred in the manager's office at the  
 24 Carlsbad store. (Ex. GG, at pp. 1-4.)

25 Some Store Leaders decided not to conduct bag or technology checks at all. (Ex. B-13., ¶ 10  
 26 (“Later in 2010, I decided that we were no longer going to conduct bag checks or technology checks  
 27 at the Fashion Island store.”); Ex. B-6, ¶ 18; Ex. B-8, ¶ 30; Ex. B-2., ¶ 25; Ex. B-12, Sec. Bag and  
 28 Personal Technology Checks ¶¶ 21-23; Ex. B-1, ¶ 29; Ex. B-9, ¶ 24; *see also, e.g.*, Ex. A-13, ¶¶ 8,

12, 15 (no bag or technology checks during his time at Century City or The Oaks during the relevant time period); Ex. A-12, ¶¶ 10, 12, 13 (no bag or technology checks during his time at The Grove, Americana at Brand, or Glendale Galleria); Ex. A-22, ¶ 12 (no technology checks in San Luis Obispo since 2010 except for a one-week period in June 2013; Ex. A-17, ¶ 8 (no bag checks during his time at Century City); Ex. GG, at p. 3 (no bag or technology checks during his observations of Century City and The Grove).))<sup>5</sup> For instance, Barbara Davis, the Store Leader for the Santa Barbara store, attempted to implement bag checks and technology checks on Apple computers and iPads (but not iPhones) for approximately a month in 2011. She decided that the store would no longer conduct checks because she felt that it sent the wrong message. (Ex. B-2, ¶¶ 21-25.) Similarly, Tom Montanez, the Store Leader for the Promenade store in Temecula, California, decided in April 2012 that the store would no longer conduct bag or technology checks because he trusted the store's employees and because the store had barely any theft. (Ex. B-8, ¶¶ 22-24.)

Some stores conducted bag checks, but not technology checks. (Ex. B-4, ¶ 22.) Some conducted technology checks on iPads and MacBooks, but not iPhones. (Ex. NN, at p. 188:7-24; Ex. A-26, ¶ 4; Ex. A-12, ¶ 14.) And, even in stores where checks occurred, Plaintiffs admit the frequency of the checks varied. (Pl. Motion, 2:1-3; *see, e.g.*, Ex. SS, at p. 72:13-18 (“Q. Of the days when you had an iPhone or your laptop with you, how many of those days did you end up going through a tech check or a technology check? A. I don't recall. Q. Was it every time? A. No.”); Ex. A-37, ¶ 10 (“I would estimate that I went through a bag or a technology check about 10-15% of the time.”); Ex. A-15, ¶¶ 8-10, 18; Ex. WW, at p. 23:8-14; Ex. B-11, ¶ 31.) Indeed, Dr. Hall confirms that most employees he observed on video for four stores – with or without bags – left the stores without any check. (*See* Ex. GG, pp. 16-17).

Indeed, a number of employees testified that they have never been subject to a bag or a technology check. (Ex. A-39, ¶ 7 (“I have never gone through or seen a bag or technology check since I started working for Apple in California.”); Ex. A-12, ¶ 10 (“I have never undergone a bag

<sup>5</sup> Plaintiffs selectively quote a policy as stating “[a]dhere to all store key policies,” (Pl. Motion, 6:7-8), but omit the following sentence that shows this policy refers to the actual keys to the store: “Adhere to all store key policies. Never hand store keys to an unauthorized employee.” (Shalov Decl. Ex. 36, APL-FRLEKIN\_00002668.) The key policy is irrelevant to the bag check policy.

1 check at The Grove since coming back here in 2012, even though I have a bag with me in the store.  
 2 I also bring my iPhone with me every day, but we do not do technology checks at The Grove so that  
 3 has never been checked either.”); Ex. A-16., ¶¶ 11, 13; Ex. A-13, ¶ 17; Ex. A-31, ¶¶ 7, 9; Ex. A-35,  
 4 ¶ 11; Ex. A-27, ¶ 9; Ex. A-5, ¶¶ 6, 11; Ex. A-3, ¶¶ 9-10; Ex. A-2, ¶¶ 6-7; Ex. A-37, ¶ 16; Ex. A-7, ¶  
 5 8.)

6 Additionally, some stores have off-site break rooms where employees may store their bags  
 7 and/or personal Apple technology, and thereby avoid potential bag or technology checks. (E.g., Ex.  
 8 SS, at p. 72:5-8 (“Q. Once the offsite break room opened, could you have left any of your bags there  
 9 if you wanted to avoid having a bag check? A. Yes.”); Ex. A-37, ¶ 15 (“At the UTC store, I never  
 10 went through a bag check because I always stored my bags in the offsite break room.”); Ex. A-26, ¶  
 11 5; Ex. A-12, ¶ 9; Ex. A-31, ¶ 7; Ex. NN, at p. 180:16-20.)

12 **D. Time Spent In Bag Checks Or Personal Apple Technology Checks, If Any,**  
 13 **Varied Significantly And Was Generally *De Minimis***

14 Even if an employee left with a bag or an Apple device and a check occurred, Dr. Hall's  
 15 analysis showed that the average time for a check was *de minimis* – between .42 and 8.7 seconds -  
 16 and the average wait time for a check was between zero and .97 seconds. (Ex. GG, at p. 16.)

17 These findings are supported by substantial evidence, including the testimony of Apple's  
 18 witnesses (including non-management employees) and the deposition testimony of Plaintiffs'  
 19 witnesses (as opposed to their declarations), which confirm that the check process generally lasted a  
 20 *de minimis* amount of time.<sup>6</sup> (E.g., Ex. A-37, ¶ 13 (“When I did have checks done, the bag and  
 21 technology check process took together about 15 seconds or less.”); Ex. A-26, ¶ 10 (“The longest  
 22 time, in total, including all waiting and check time, that I've ever experienced in a bag check is about  
 23 30 seconds. This (30 seconds' duration) would be exceedingly rare.”); Ex. A-15, ¶ 11 (“The bag  
 24

25 <sup>6</sup> Plaintiffs' motion relies, in part, on the declarations of former employees Cherie Coles, Susan  
 26 Schneider and Omar Caputo. (Shalov Decl. Ex. 20, 24, 59.) Apple noticed the depositions of these  
 27 individuals and confirmed the depositions with Plaintiffs' counsel, yet these individuals failed to  
 28 appear for their depositions. (Boyer Decl. at ¶ 25.) The Court should therefore disregard their  
 declarations. *See Evans v. IAC/Interactive Corp.*, 244 F.R.D. 568, 571 (C.D. Cal. 2007) (on motion  
 for class certification, striking declarations for witnesses who were not made available for  
 deposition).

check process usually takes about 10 seconds or less.”); Ex. A-22, ¶ 6 (longest wait was “about one minute.”), ¶ 7 (“The bag check itself takes at most 15-20 seconds.”); Ex. YY at p. 88:17-22 (stating at least 50% of the time a bag check lasted only 30 seconds).

#### **E. Whether Checks Occurred On Or Off The Clock Varied**

Plaintiffs assert that “Apple does not compensate many Apple employees for checks,” (Pl. Motion, 10:6 (emphasis added)), which necessarily means that some bag checks and/or technology checks are compensated. Substantial evidence confirms this fact. (See Ex. WW, at p. 15:15-17 (bag checks sometimes occurred on the clock); Ex. B-4, ¶¶ 25-26; Ex. B-11., ¶ 35; Ex. XX, at p. 85:4-8 (testifying that some bag checks were on the clock while some were off the clock).) Indeed, Plaintiff Speicher admitted it would have been an option for her to wait to clock out until after she had gone through a bag or technology check. (Ex. TT, p. 119:14-20.) This is particularly true at stores with time clocks in remote break rooms, where employees could leave their bags or devices in lockers in the remote break rooms or clock out at those locations. (Ex. B-10, ¶ 42 (“Employees who have their bags or personal technology checked could clock out after the check by leaving the store and clocking out using the computers at the offsite break room.”); Ex. OO, at pp. 262:18-264:18; Ex. B-5, ¶ 29; Ex. B-15, ¶ 23.)

### **III. PLAINTIFFS’ MOTION IS FUNDAMENTALLY IMPROPER BECAUSE PLAINTIFFS DID NOT SATISFY THE MANDATORY REQUIREMENTS OF RULE 23(A) AND RULE 23(B)**

Plaintiffs acknowledge that courts have denied class certification in bag check cases under Rule 23(b)(3) because individual liability questions predominate. Plaintiffs attempt to avoid these “predominance-related concerns” by skipping Rule 23(b) entirely and moving for certification of particular issues under Rule 23(c)(4). (Pl. Motion, 22:11-23:3, Pl. Motion, 23:2 (“With this motion, brought under Federal Rule 23(c)(4) rather than Federal Rule 23(b)(3) . . .”); Pl. Notice of Motion, 1:6-8 (stating Plaintiffs “will move and hereby do move for an order, pursuant to Rules 23(a) and 23(c)(4) of the Federal Rules of Civil Procedure, granting certification of the following Class . . .”).) Plaintiffs’ failure to satisfy Rule 23(b) is fatal to their motion.

In order to certify any type of class, Plaintiffs must meet the prerequisites set forth in Rule 23(a) (“Prerequisites”) and one of the elements of Rule 23(b) (“Types of Class Actions”). *Comcast*

1 *Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591,  
 2 614 (1997) (“[i]n addition to satisfying Rule 23(a)’s prerequisites, parties seeking class certification  
 3 must show that the action is maintainable under Rule 23(b)(1), (2), or (3).”).

4 Rule 23(c), entitled “Certification Order; Notice to Class Members; Judgment; Issues  
 5 Classes; Subclasses,” does not provide an independent basis for class certification. Rule 23(c) is  
 6 merely a case management tool a court may employ if it concludes that a dispute may be litigated as  
 7 a class action under Rules 23(a) and (b). Courts must – and do – deny class certification when a  
 8 plaintiff does not carry his burden to establish through evidentiary proof that the action is  
 9 maintainable under Rule 23(b)(1), (2), or (3).

10 In fact, *Valentino*, upon which Plaintiffs rely, actually reversed and remanded an order that  
 11 certified issues under Rule 23(c)(4)(A) “because there has been no demonstration of how this class  
 12 satisfies important Rule 23 requirements, including the predominance of common issues over  
 13 individual issues and the superiority of class adjudication over other litigation alternatives.”  
 14 *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1230 (9th Cir. 1996) (emphasis added). As stated  
 15 by the Ninth Circuit, “[i]n order for a class action to be certified, the plaintiffs must establish the four  
 16 prerequisites of Fed. R. Civ. P. 23(a) and at least one of the alternative requirements of Fed. R. Civ.  
 17 P. 23(b).” *Id.* at 1234 (emphasis added). Because “the certification order merely reiterates Rule  
 18 23(b)(3)’s predominance requirement and is otherwise silent as to any reason why common issues  
 19 predominate over individual issues certified under Rule 23(c)(4)(a),” and because “[t]here has been  
 20 no showing by Plaintiffs of how the class trial could be conducted,” the Ninth Circuit held “[t]he  
 21 district court abused its discretion by not adequately considering the predominance requirement  
 22 before certifying the class” *Id.*; *see also Sepulveda v. Wal-Mart Stores, Inc.*, 464 Fed. Appx. 636,  
 23 637 (9th Cir. 2011) (affirming the district court’s denial of certification of specific issues under Rule  
 24 23(c)(4) based on the court’s denial of class certification under Rule 23(b)(2) and 23(b)(3));  
 25 *Stockwell v. City & County of San Francisco*, 2015 U.S. Dist. LEXIS 61577, \*24-28 (N.D. Cal. May  
 26 8, 2015) (rejecting plaintiffs’ request to certify a liability-only class action under Rule 23(c)(4)  
 27 because the plaintiffs did not seek certification of a liability-only class under Rule 23(b)(2)); *Amador*  
 28 *v. Baca*, 299 F.R.D. 618, 636-37 (C.D. Cal. 2014).

1 Similarly, in another case cited by Plaintiffs, *Cherry v. City College of San Francisco*, 2005  
 2 WL 6769124 (N.D. Cal. June 15, 2005) (Alsup, J.), this Court stated: “[a] motion for class  
 3 certification must satisfy the prerequisites of FRCP 23(a) as well as one of the three conditions set  
 4 forth by FRCP 23(b).” *Cherry*, 2005 WL 6769124, at \*2 (emphasis added). The plaintiffs in *Cherry*  
 5 sought certification of an injunctive relief class under Rule 23(b)(2). *Id.* This Court certified an  
 6 injunctive relief class, but only after finding that Rule 23(b)(2) was satisfied.<sup>7</sup> *Id.* at \*7.

7 So too, in *Lilly v. Jamba Juice Company*, 2014 WL 4652283 (N.D. Cal. Sept. 18, 2014),  
 8 another case cited by Plaintiffs, where the district court expressly stated that “[c]lass certification  
 9 under Rule 23 is a two-step process,” that requires a plaintiff to satisfy both Rule 23(a) and Rule  
 10 23(b). *Lilly*, 2014 WL 4652283 at \*2. “First, Plaintiff must demonstrate that the four elements of  
 11 23(a) are met . . .” *Id.* “Second, a plaintiff must also establish that one of the bases for certification  
 12 in Rule 23(b) is met.” *Id.* (emphasis added). The plaintiffs in *Lilly* asserted certification of a  
 13 damages class was appropriate under Rule 23(b)(3). *Id.* The Court agreed as to liability, and  
 14 certified a class on that issue: “Since Plaintiff has established that, with the exception of determining  
 15 damages, all the required elements of class certification have been met, the Court will exercise its  
 16 discretion pursuant to Rule 23(c)(4) of the Federal Rules of Civil Procedure to certify the proposed  
 17 class solely for purposes of liability.” *Id.* at \*11 (emphasis added). Thus, the Court applied Rule  
 18 23(c)(4) only after determining that the required elements of certification had been met under Rule  
 19 23(a) and Rule 23(b).<sup>8</sup> In short, Rule 23(c)(4) is potentially available as a case management tool  
 20 only if the plaintiff first satisfies both Rule 23(a) and Rule 23(b) to obtain class certification. Where,  
 21

22 <sup>7</sup> Plaintiffs here, admittedly, do not seek certification under Rule 23(b)(2). Further, Plaintiffs lack  
 23 standing to certify a class under Rule 23(b)(2) for injunctive relief because there is no threatened  
 future injury for former employees. *See Ellis v. Costco*, 657 F.3d 970, 988 (9<sup>th</sup> Cir. 2011) citing  
*Dukes*, 131 S.Ct. at 2559-60 (only current employees have standing to seek injunctive relief).

24 <sup>8</sup> Additionally, none of the Seventh Circuit cases cited by Plaintiffs held that a court could certify  
 25 “particular issues” under Rule 23(c)(4) without the plaintiff first satisfying the requirements of Rule  
 26 23(a) and Rule 23(b). *See Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 801-802 (7<sup>th</sup> Cir. 2013)  
 (finding that common questions of liability predominate over individual questions under Rule  
 27 23(b)(3), and therefore permitting class certification); *McReynolds v. Merrill Lynch*, 672 F.3d 482,  
 483, 492 (7<sup>th</sup> Cir. 2012) (determining that Rule 23(b)(2) was satisfied, and therefore permitting  
 28 certification of the issue of injunctive relief under Rule 23(c)(4)); *Jacks v. DirectSat USA, LLC*, 2015  
 WL 1087897, at \*8 (N.D. Ill. March 25, 2015) (decertifying a class as to the entire cause of action  
 where individual issues as to damages predominated, but certifying a new class only as to liability).

as here, Plaintiffs cannot satisfy Rule 23(a) and do not even attempt to satisfy Rule 23(b), class certification must be denied.

#### IV. PLAINTIFFS CANNOT SATISFY RULE 23(A)

Rule 23(a) requires Plaintiffs to prove that there are “in fact” sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation. *Behrend*, 133 S. Ct. at 1432; *see also* Fed. R. Civ. P. 23(a). Plaintiffs cannot make this showing.

##### A. Plaintiffs Failed To Establish That The Class Is Ascertainable Or Numerous

Plaintiffs cannot satisfy Rule 23(a) because it is impossible to determine who belongs in the class, and thus, whether the class is numerous. In particular, Plaintiffs admit they do not know and have no proposed a methodology for identifying: (1) who brought a bag on any particular day; and (2) who left the store for a meal break with a bag on any particular day. (Boyer Decl., Ex. BB Nos. 5, 10, 13 18.)

Tellingly, Plaintiffs have been litigating this case for nearly two years and could identify only 23 individuals out of a proposed class of more than 12,400 to provide declarations to support Plaintiffs’ claims. This paltry showing of individuals who claim they were somehow harmed by Apple’s bag and technology check policy –only approximately .18% of the putative class – does not evidence a class-wide violation. In contrast, Apple produced declarations from 40 putative class members (not including putative class members who are now Store Leaders): 10 of whom confirmed they never participated in a bag check; 17 of whom worked at stores where checks occurred inconsistently, or no checks occurred for some or all of the time they worked there; and 30 of whom testified the checks they had lasted a *de minimis* amount of time. At a minimum, this disparity in testimony shows that identifying potential class members, and determining numerosity, requires an employee-by-employee inquiry.

##### B. Fundamental Conflicts Between Plaintiffs’ Testimony And Putative Class Member Testimony Create Conflicts For Plaintiffs’ Counsel

“The adequacy of representation requirement . . . requires that two questions be addressed: (a) do the name plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the

1 class?” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2008). “The responsibility of  
 2 class counsel to absent class members whose control over their attorneys is limited does not permit  
 3 even the appearance of divided loyalties of counsel.” *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449,  
 4 1465 (9th Cir. 1995). “The spectacle of an attorney skewering her own client on the witness stand in  
 5 the interest of defending another client demeans the integrity of the legal profession and undermines  
 6 confidence in the attorney-client relationship.” *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 467  
 7 (2003).

8 District courts have repeatedly denied class certification where the plaintiffs’ counsel has a  
 9 conflict of interest. By way of illustration, a conflict was apparent where: “From the testimony in  
 10 the record, it appears as Plaintiffs’ counsel will either have to cross-examine [a client] and impeach  
 11 his credibility, or ‘soft-pedal’ their examination of [that client] to the detriment of their  
 12 representation of the class members in this action.” *Baas v. Dollar Tree Stores, Inc.*, 2008 WL  
 13 906496, at \*3-4 (N.D. Cal. April 1, 2008) (denying class certification); *see also Lou v. MA*  
 14 *Laboratories, Inc.*, 2014 WL 68605, at \* 1 (N.D. Cal. Jan. 8, 2014) (Alsup, J.) (denying class  
 15 certification because “[a] class . . . deserves to be championed by its counsel unencumbered by their  
 16 duties to other clients. Counsel have a conflict and may not serve.”)

17 Here, to reconcile the conflicting testimony in this case, Plaintiffs’ counsel will either have to  
 18 impeach the credibility of those putative class members who, in Plaintiffs’ words, “minimize the  
 19 length of the Checks” and “represent that Checks take place less frequently,” thus breaching the duty  
 20 of loyalty to those non-favorable putative class members, or soft-pedal their examination of the non-  
 21 favorable putative class members to the detriment of their representation of Plaintiffs and the other  
 22 putative class members in this action. This is particularly true with regard to the store leaders who  
 23 are also putative class members, such as Danya Bonnett, Casey Shull, and Margaret Karn. (*See Ex.*  
 24 *B-1, ¶ 2; Ex. B-12, ¶ 4; Ex. B-4, ¶ 4.*) Indeed, in the motion to certify issues, Plaintiffs’ counsel has  
 25 already sought to discredit some of their would-be clients’ testimony. (*See Pl. Motion, 6:2-4 (“[O]ne*  
 26 *store manager [putative class member Danya Bonnett] actually calling the policy ‘voluntary’ and ‘a*  
 27 *nice thing to do.’ Ex. 21 at 39. The written record belies these assertions.”*) (emphasis added).)  
 28 Plaintiffs’ counsel also repeatedly contrasted the testimony of Plaintiffs’ proffered witnesses with

1 other putative class members who are now managers, such as Shull and Karn. (*See* Pl. Motion, 8:12-  
 2 13 (“In contrast, the Managers and Store Leaders represent that Checks take place less frequently”),  
 3 9:17 (“In contrast, the Manager Declarations minimize the length of the Checks.”) (emphasis  
 4 added).) If a class is certified, Plaintiffs’ counsel will be counsel for all class members, including  
 5 non-exempt managers, not just Plaintiffs and Plaintiffs’ preferred witnesses. Consequently, there is  
 6 an irreconcilable conflict.

7 Further, Plaintiffs Frlekin, Dowling, and Speicher have conflicts of interest with other  
 8 putative class members who consider them dishonest and/or who directly refute Plaintiffs’ individual  
 9 claims. (*See* Ex. A-17, ¶ 20 (“I knew Plaintiff Amanda Frlekin when she worked here. I found her  
 10 to be not trustworthy and dishonest. She told a lot of colorful, untrue stories.”); Ex. A-12, ¶ 17  
 11 (refuting Dowling’s claims); Ex. A-15, ¶¶ 24, 25 (refuting Frlekin’s and Speicher’s claims).) To  
 12 prove the named Plaintiffs’ claims, Plaintiffs’ counsel will have to discredit fellow putative class  
 13 members Kinder, Glezer, and Hart who do not believe Frlekin’s, Dowling’s, and Speicher’s claims  
 14 are credible. Accordingly, Plaintiffs’ counsel cannot adequately represent and safeguard the  
 15 interests of Plaintiffs without attacking other would-be clients on the stand.

### 16 **C. Plaintiffs Failed To Establish Commonality**

17 “Commonality requires the plaintiff to demonstrate that the class members have suffered the  
 18 same injury.” *Dukes*, 131 S. Ct. 2541, 2551 (internal quotations omitted). “This does not mean  
 19 merely that they have all suffered a violation of the same provision of law.” *Id.* Instead, “[t]hat  
 20 common contention ... must be of such a nature that it is capable of classwide resolution—which  
 21 means that determination of its truth or falsity will resolve an issue that is central to the validity of  
 22 each one of the claims in one stroke.” *Id.*

23 As the Supreme Court recognized, any class plaintiff can easily raise common “questions”:

24 For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers  
 25 have discretion over pay? Is that an unlawful employment practice? What remedies  
 26 should we get? Reciting these questions is not sufficient to obtain class certification.

26 *Dukes*, 131 S. Ct. at 2551 (emphasis added).

27 As explained in *Dukes*: “What matters to class certification . . . is not the raising of common  
 28 ‘questions’ – even in droves – but, rather the capacity of a classwide proceeding to generate common

1 answers apt to drive the resolution of the litigation.” *Id.* (quotation omitted).

2 Here, Plaintiffs’ 16 purported common “questions” are remarkably similar to those rejected  
3 in *Dukes* both in language and in that they do not have common answers. For example: “Did Apple  
4 conduct Checks of Apple Employees at California Stores pursuant to the policy?” “Were Apple  
5 Employees who went through Checks subject to Apple’s ‘control’ for purposes of imposing liability  
6 under California law?” (*See* Pl. Motion, 18:5-24.) Plaintiffs themselves implicitly acknowledge  
7 there are no common answers to these questions. (*See* Pl. Motion, 2:1-4 (admitting the variety of  
8 individualized issues).) Because Plaintiffs merely raise common “questions,” and further admit  
9 those questions do not have common answers, Plaintiffs’ motion must fail.

#### 10 **V. PLAINTIFFS CONCEDE THAT RULE 23(B) CANNOT BE SATISFIED**

11 As set forth above in Section III(A), Plaintiffs admittedly make no attempt to satisfy the  
12 requirements of Rule 23(b), which dooms their motion for class certification. *E.g., Behrend*, 133 S.  
13 Ct. at 1432. Moreover, Plaintiffs concede that courts have denied class certification in bag check  
14 cases under Rule 23(b)(3) because of “predominance-related concerns” regarding individualized  
15 questions of liability. (Pl. Motion, 22:11-23:3 (citing to *Ogiamien v. Nordstrom, Inc.*, 2015 WL  
16 773939 (C.D. Cal. Feb. 24, 2015) and *Stiller v. Costco Wholesale Corp.*, 298 F.R.D. 611, 629 (S.D.  
17 Cal. 2014); *see also Quinlan v. Macy’s Corporate Services, Inc.*, 2013 U.S. Dist. LEXIS 164724  
18 (C.D. Cal. August 22, 2013)]. Substantial evidence and Plaintiffs’ own admissions establish that  
19 those same “predominance-related concerns” are manifest here, because the record demonstrates that  
20 Plaintiffs’ theory indisputably involves individual inquiry regarding liability.

#### 21 **A. Individualized Questions Of Fact Predominate As To Whether An Employee** 22 **Brought A Bag Or Personal Apple Technology To The Store On Any Given Day**

23 Most significantly, there is no manageable way to determine on a class-wide basis which  
24 employees were even potentially subject to checks on any given day, because there is no manageable  
25 way to determine which employees brought a bag or personal Apple technology into the store on any  
26 given day. *See Ogiamien v. Nordstrom, Inc.*, 2015 U.S. Dist. LEXIS 22128 (C.D. Cal. February 24,  
27 2015) (denying class certification in a bag check case in part due to individualized issues concerning  
28 which employees brought a bag on any given day); *Quinlan v. Macy’s Corporate Services, Inc.*,

1 2013 U.S. Dist. LEXIS 164724 (same).

2 By way of illustration, in *Ogiamien*, the court denied class certification in part because even  
3 though Nordstrom had a bag check policy that facially covered all its employees, the inspection  
4 protocols only applied to employees who brought bags, and many employees did not bring bags on  
5 any given day. *Ogiamien*, 2015 U.S. Dist. LEXIS 22128 at \*9. This “undisputably involves  
6 individual inquiries regarding liability,” because “[i]f an employee did not carry a bag to work,  
7 Nordstrom's bag-check policy cannot create any liability for Nordstrom with respect to that  
8 employee – there are simply no lost wages,” *Id.* (italics in original; underline added).

9 Similarly, in *Quinlan*, the court denied class certification in part because even though Macy’s  
10 had a bag check policy that facially covered all its employees, “the inspection protocols only applied  
11 to those employees who chose to travel with packages or baggage. There is no indication what  
12 proportion of the 84,000 employees Plaintiff seeks to represent made such a choice.” *Quinlan*, 2013  
13 U.S. Dist. LEXIS 164724 at \*11.

14 Here, Plaintiffs admit “not every Apple Employee brings a bag or Apple product to work  
15 every day.” (Pl. Motion, 1:24-2:1.) As set forth above in Section II.B., many Apple employees do  
16 not bring bags or personal Apple technology to work with them, or do not do so every day. Indeed,  
17 in the San Francisco store alone, Dr. Hall found that 49% of the 399 employees he observed left the  
18 store without any bags or packages. (Ex. GG, p. 2.) Apple specifically asked Plaintiffs during  
19 discovery to identify (1) who brought a bag or personal Apple technology on any particular day; and  
20 (2) who left the store for a meal break with a bag or personal Apple technology on any particular  
21 day. Plaintiffs were unable to do so. (*See Boyer Decl.*, Exs. Y, AA, BB.)

22 Additionally, even if an employee chose to bring a bag on any particular workday, there is no  
23 manageable way to determine: (1) whether the employee chose to leave the store for meal breaks; (2)  
24 whether the employee took a bag with them when leaving for meal breaks or at the end of their shift;  
25 and/or (3) whether the employee left his bag in the remote break room (if any) and therefore was not  
26 subject to a check when leaving the store. (Shalov Decl., Ex. 15, ¶ 6 (“I did not leave the store very  
27 often for meal breaks . . .”); Ex. ZZ, at p. 62:2-5 (admitting there were times when employees left for  
28 a meal break and did not take a bag with them); Ex. PP, at p. 64:5-6 (“Since it was a meal break, I

normally didn't bring out my bag.”); Shalov Decl., Ex. 59, ¶ 6; Boyer Decl., Ex. B-2., ¶ 36; Ex. B-9, ¶ 51; Ex. B-3, ¶¶ 42, 43.) Employees who left the store for meal breaks without bags did not take part in checks. (*E.g.*, Ex. A-20, ¶ 8.)

Because this threshold inquiry – whether an employee even had a bag to be checked when leaving the store – cannot be determined on the basis of evidence equally pertinent to all members of the putative class, class treatment is improper. Again, this individualized inquiry is critical to liability because if an employee did not carry a bag or personal Apple technology to work, Apple’s bag check and technology check policy cannot create any liability for Apple with respect to that employee. *See Ogamien*, 2015 U.S. Dist. LEXIS 22128 at \*9; *Quinlan*, 2013 U.S. Dist. LEXIS 164724 at \*11.

**B. For Employees Who Brought A Bag Or Personal Apple Technology To Work, There Is No Manageable Way To Determine Whether A Check Took Place**

There is also no manageable way to determine on a class-wide basis whether employees who brought a bag or personal Apple technology to work participated in a check on any given day, because the individual practices at each Apple store varied widely as to whether and when checks took place. Again, Plaintiffs admit “not every Apple Employee goes through a Check each time he or she exists a California Store,” and “there are times when some California Stores do not conduct checks.” (Pl. Motion, 2:1-3.)

“[T]he relevant question is not whether a bag check is mandatory once commenced, but whether the store mandates that all employees are checked before they leave the workplace.” *Ogamien*, 2015 U.S. Dist. LEXIS 22128 at \*11. In *Ogamien*, the district court held that this question could not be resolved on a class basis because “the evidence in the record is quite clear – not every employee carried a bag and not every employee with a bag was checked.” *Id.* at \*12 (emphasis added). As a result, the “proposed class inherently involves issues of individualized inquiry because Nordstrom cannot be liable to employees that were never subject to the alleged unlawful policy.” *Id.* at \*12-13 (italics in original; emphasis added).

The district court in *Quinlan* reached the same conclusion because: “Managers implement different strategies not only in the different Macy's locations, but even within the same store,

1 depending on the time of day, day of the week, season, level of traffic inside the store, and other  
 2 factors. . . . Indeed, some managers do not conduct random employee package searches at all.”  
 3 *Quinlan*, 2013 U.S. Dist. LEXIS 164724 at \*12.

4 The district court in *Stiller v. Costco*, 2014 U.S. Dist. LEXIS 52237 (S.D. Cal. April 15,  
 5 2014), also held that variation in circumstances allegedly resulting in unpaid work time precluded  
 6 class treatment. In *Stiller*, the district court decertified a class of Costco employees who alleged they  
 7 were “locked down” inside stores after closing and without pay, because “Costco has offered  
 8 convincing evidence that not all employees experienced unpaid delay as a result of the Alleged  
 9 Policy . . . . And, if it can only be determined on a class-wide basis whether the Alleged Policy  
 10 sometimes resulted in unpaid OTC [off the clock] time, individualized determinations will be  
 11 required to determine the question of liability.” *Stiller*, 2014 U.S. Dist. LEXIS 52237 at \*20  
 12 (emphasis in original). “This is because liability hinges on whether employees actually performed  
 13 OTC work.” *Id.*

14 Here, as in *Ogiamien*, *Quinlan*, and *Stiller*, the evidence overwhelmingly establishes that  
 15 Apple's policy, even with regard to the more limited subset of putative class members who actually  
 16 did carry bags or personal Apple technology to work, does not mandate checks each time an  
 17 employee leaves the store with a bag or an Apple device. As this Court previously observed in its  
 18 ruling on summary judgment, “[t]he record in this action . . . involves many varying fact patterns and  
 19 lends itself to a myriad of different interpretations of Apple’s policy and practice regarding when an  
 20 employee is required to undergo a security screening.” (May 30, 2014 Order, 5:9-12 (Dkt. No. 166)  
 21 (emphasis added).)

22 As set forth above in Section II(C), practices varied significantly among stores as to whether  
 23 and when checks were conducted at all. In particular, Apple has provided declarations from 16 Store  
 24 Leaders, each of whom implements the bag and technology check policy as he or she sees fit. (Ex.  
 25 WW, 23:8-14; Ex. B-2, ¶ 18; Ex. B-12, Sec. Bag and Personal Technology Checks ¶ 23; Ex. B-1, ¶¶  
 26 5, 29; Ex. B-9, ¶ 24; Ex. B-11, ¶ 30; Ex. B-4, ¶ 22; B-5, ¶ 20; Ex. B-6, ¶ 17; Ex. B-3, ¶ 29; Ex B-13,  
 27 ¶ 10; Ex. B-8, ¶ 30; Ex. B-7, ¶ 40.) Many stores do not conduct bag or technology checks at all.  
 28 (Ex. A-22, ¶ 12; Ex. A-13, ¶¶ 8, 12, 15; Ex. A-17, ¶ 8; Ex. A-12, ¶¶ 10, 12, 13.) Ten employees

1 testified they have never been subject to a bag and/or a technology check. (Ex. A-39, ¶ 7; Ex. A-16,  
2 ¶ 11, 13; Ex. A-13, ¶ 17; Ex. A-37, ¶ 16; Ex. A-12, ¶ 10; Ex. A-31, ¶¶ 7, 9; Ex. A-35, ¶ 11; Ex. A-  
3 27, ¶ 9; Ex. A-5, ¶¶ 6, 11; Ex. A-3, ¶¶ 9-10; Ex. A-2, ¶¶ 6-7; Ex. A-7, ¶ 8.)

4 Moreover, some stores have off-site break rooms where employees may store their bags  
5 and/or personal Apple technology, and may therefore avoid potential bag or technology checks. (Ex.  
6 SS, 72:5-8; Ex. A-37, ¶¶ 14, 15; Ex. A-26, ¶ 5; Ex. A-12, ¶ 9; Ex. A-31, ¶ 7; Ex. NN, 180:16-20.)  
7 Nor were technology check practices uniform. Some stores checked iPads and MacBooks, but not  
8 iPhones. (Ex. NN, 188:7-24; Ex. A-26, ¶ 4.) And, even in stores where bag and/or technology  
9 checks occurred, the frequency of the checks varied. (Ex. SS, 72:13-18; Ex. A-37, ¶ 10; Ex. A-15,  
10 ¶¶ 8-10, 18; Ex. WW, 23:8-14.)

11 In short, substantial evidence establishes significant variances between the bag and/or  
12 technology check experiences, if any, of employees working in Apple's 52 California stores over the  
13 now nearly six-year putative class period. Plaintiffs' bag and technology check theory therefore  
14 suffers the same lack of predominance as the off-the-clock theories that were denied certification in  
15 *Ogiamien*, *Quinlan*, and *Stiller*. Class certification should be denied here for the same reason.

16 **C. For Employees Who Brought A Bag, And A Check Took Place, There Is No**  
17 **Manageable Way To Determine If The Bag Contained "A Necessity Of Life"**

18 Furthermore, Apple's position is that employees voluntarily choose to bring a bag or personal  
19 Apple technology to work, and therefore they freely volunteer to potentially participate in a bag  
20 check or technology check.<sup>9</sup> In its Order denying summary judgment, this Court indicated that  
21 liability for bag checks may depend on whether "Apple employees may need to bring a bag to work  
22 for reasons they cannot control, such as the need for medication, feminine hygiene products, or  
23 disability accommodations." (May 30, 2014 Order, 7:23-25; *see also* May 30, 2014 Order, 7:26-28  
24 ("On the other hand, plaintiffs' authorities are also not on point because they all involve  
25 requirements placed on all employees by their employer or the nature of their work, rather than by  
26 the necessities of life.").) To the extent potential liability depends on whether an employee was  
27

28 <sup>9</sup> Again, Apple did not require employees to bring a bag to work. *See* Section II(A) above.

1 forced to carry a bag to transport a “necessity of life,” and assuming it was feasible to determine  
 2 which putative class members brought a bag to work and actually went through a check on a  
 3 particular day (which it is not), it is impossible to determine on a class-wide basis what was in each  
 4 putative class member’s bag on that day.<sup>10</sup>

5 The record reflects a wide variety of non-essential items that employees brought to work,  
 6 which demonstrates that individualized inquiry is necessary to discover what was in each bag on  
 7 each occasion to determine whether it was a “necessity of life.” (*E.g.*, Ex. A-8, ¶ 11 (“On the rare  
 8 occasions when I brought a bag to work, it’s usually to carry a change of clothes to meet up with  
 9 friends after work.”); Ex. A-20, ¶ 4 (“I sell moustache wax, so sometimes I carry moustache wax in  
 10 my bag to sell during my breaks or when my shift is over.”); Ex. YY, 219:4-9 (“I live 12 miles out of  
 11 town. So say I was going to stay in town and go to a movie, catch a movie with a friend or go for a  
 12 bite, I might bring a change of clothes or some additional make-up for the day.”).)

13 Moreover, what constitutes a “personal” versus “necessary” item is inherently subjective and  
 14 specific to each individual, as are the credibility determinations necessary to evaluate each  
 15 individual’s claim. For instance, in opposition to Apple’s motion for summary judgment, Plaintiffs  
 16 submitted the declaration of former opt-in plaintiff Claudia Wright, who claimed she brought a bag  
 17 “every day” to carry “essential” and “highly personal” items such as “feminine products” and  
 18 “medications.” (Pl. Ex. 119 (Wright Decl. ISO Plaintiffs’ Opposition to Summary Judgment), ¶ 7.)  
 19 At deposition, Wright testified the term “feminine products” referred to “[m]y cosmetics, you know,  
 20 perfume, a hair brush.” (Ex. YY, 218:19-219:13; 220:5-7.) These are not “necessary” to life.  
 21 Similarly, Claudia Wright testified she did not carry medication every day, only “maybe ten or 15  
 22 times over five years.” (Ex. YY, 218:5-13.) Masch-Al Malek also claimed she used a bag to carry  
 23 “medication,” (Malek Decl., ¶ 3), but she clarified at her deposition that she was referring to over-

24  
 25 <sup>10</sup> To the extent a phone could be considered a “necessity of life,” the check policy applies only to  
 26 Apple technology, and consequently, an employee could bring a non-Apple cellphone to avoid the  
 27 potential for a check. Further, Lauren Feist is a HR manager whom Plaintiffs incorrectly refer to as  
 28 an “Apple executive,” (Pl. Motion, 5:1-3), not a putative class member or an Apple executive. And,  
 while she did say that “phones” may be “a necessity for things such as emergencies or family  
 emergencies,” she never said that an iPhone was a necessity of life. (Ex. XX, 15:20-16:19; 65:9-20;  
 140:9-12.)

1 the-counter Ibuprofen, (Ex. BBB, 36:18-37:10), which is not “necessary” to life.

2 Finally, while some female employees may occasionally choose to carry feminine hygiene  
3 products to work in a bag, not every female employee chooses to do so or needs to do so every day.  
4 Indeed, some female putative class members testified either that they sometimes do not bring a bag,  
5 (e.g., Ex. A-30, ¶ 3; Ex. A-13, ¶ 7), or did not include feminine products among the items carried in  
6 their bag, (e.g., Ex. A-26, ¶ 7). Accordingly, to the extent liability depends on whether an employee  
7 must bring a bag as a life necessity on a particular occasion, there is no way to answer this question  
8 on a class-wide basis.

9 **D. Individualized Questions Predominate As To Whether Employees Spent More**  
10 **Than A *De Minimis* Amount Of Time In Checks**

11 Plaintiffs also cannot manageably prove whether any check that did occur lasted more than a  
12 *de minimis* amount of time, and therefore is compensable, on a class-wide basis. *See Lindow v.*  
13 *United States*, 738 F.2d 1057, 1063 (9th Cir. 1984); *Troester v. Starbucks*, 2014 U.S. Dist. LEXIS  
14 37728, \*7-9 (C.D. Cal. March 7, 2014) (granting summary judgment on state law wage claims  
15 because alleged unpaid time was less than 10 minutes); *Alvarado v. Costco*, 2008 WL 2477393 at  
16 \*3-4 (N.D. Cal. June 18, 2008) (granting summary judgment because alleged unpaid time was *de*  
17 *minimis*). The California Division of Labor Standards Enforcement has repeatedly confirmed that  
18 the *de minimis* standard applies to California wage claims. (See Apple’s Request for Judicial Notice,  
19 Ex. A (Opinion Letter February 3, 1994 (“It should also be noted that the Division has adopted the  
20 *de minimis* rule relied upon by the federal courts.”)); Ex. B (DLSE Enforcement Policies and  
21 Interpretations Manual § 46.6.4 (DLSE applies *de minimis* rule) § 47.2.1 (same); § 48.1.9 (same).)

22 In *Quinlan*, the district court observed that “[a]s a general rule, employees cannot recover for  
23 otherwise compensable time if it is *de minimis*.” *Quinlan*, 2013 U.S. Dist. LEXIS 164724 at \*13,  
24 quoting *Lindow*, 738 F.2d at 1062. The court also found that: “employee estimates of unpaid  
25 waiting time vary widely. Quinlan himself testified that while some searches took up to twenty  
26 minutes, others took only seconds. Other employee declarants’ estimates range from one minute to  
27 thirty minutes.” *Id.* Accordingly, “differences in waiting times, not only between employees, but  
28 also by the same employee on different occasions, might well affect not only a class member’s

1 recovery, but the very viability of a particular claim.” *Id.* (emphasis added); *cf. Lusby v. Gamestop*,  
 2 2015 U.S. Dist. LEXIS 42637 at \*11 (N.D. Cal. March 31, 2015) (noting that Gamestop would have  
 3 likely challenged liability on several grounds, including “the amount of time spent on security  
 4 checks was only a matter of seconds or minutes, making these claims *de minimis*”). The same is true  
 5 here.

6 At the summary judgment hearing, this Court accurately foretold that Plaintiffs' theory would  
 7 necessarily get bogged down into individualized issues:

8 [I]f it devolves into 45 minutes in one store and look at the video in the store, look at  
 9 Black Friday in that store, that to me is possibly not something we should be doing as  
 10 an opt-in class. I can – you know, I have the authority to just say: I don’t care if you  
 11 brought it under the Rule 23 or if you think you brought it under - - whatever you  
brought it under, that is so bogged down in individual issues, no way. We're not  
going to do that.

12 (May 22, 2014 Transcript of Proceedings, 54:24-55:7 (emphasis added). Dkt No. 167.)

13 But that is exactly the type of individualized inquiry that would be necessary to determine  
 14 liability under Plaintiffs' bag check and technology check claims. For instance, with regard to the  
 15 San Francisco store alone, Dr. Hall analyzed the busiest egress periods on the busiest days identified  
 16 by Plaintiffs (*i.e.*, launch days and Black Friday) and observed: (1) 50% of employees left the store  
 17 without undergoing any type of check; (2) of those employees who participated in a check, 91% left  
 18 the store with zero waiting time, and (3) for those employees who waited for a check, the average  
 19 waiting time was 1.3 seconds. (Ex. GG, p. 2.)

20 These findings are supported by the testimony of numerous employees at the San Francisco  
 21 store, who confirm that even if they actually undergo a check, they do not have to wait for the check.  
 22 (Ex. A-18, ¶ 8 (“In 3.5 years at this store, the longest I have ever waited in line for a beg / tech check  
 23 is approximately 15-20 seconds (that would be if 3-4 employees were ahead of me.”); Ex. A-26, ¶ 10  
 24 (“The longest time, in total, including all waiting and check time, that I've ever experienced in a bag  
 25 check is about 30 seconds. This (30 seconds' duration) would be exceedingly rare.”); Ex. NN,  
 26 82:19-83:1 (“Q. – were there any lines to get your bag checked by the security guard” A. On exit?  
 27 Q. On exit? A. There's no lines. It is not part of – first of all, there is no lines. You won't see  
 28 employee lines in the store. It doesn't exist. Regardless of the size of the store, things flow in and

1 out, very organically.”).

2 Yet, in direct conflict with both Dr. Hall's video analysis and the testimony of numerous  
3 putative class members in the San Francisco store, Plaintiff Kalin asserts that, in the same store, he  
4 waited 5 to 45 minutes, and sometimes up to an hour, for bag checks. (Kalin Decl. ISO Opp to MSJ,  
5 ¶ 67.)<sup>11</sup> Moreover, Plaintiffs’ motion suggests that bag checks take 5 to 20 minutes. (Pl. Motion,  
6 9:12-16.) But Plaintiffs admit time spent in bag checks can be less than 5 minutes: “the Checks  
7 sometimes take less than a minute in duration and sometimes more.” (Pl. Motion, 2:3-4 (emphasis  
8 added).) Further, while some of Plaintiffs’ witnesses provided estimates in their declarations of the  
9 amount of time allegedly spent in bag checks, they admitted at deposition that bag checks can  
10 sometimes take far less time. (*Compare, e.g.*, Pl. Ex. 137 (“Wright Decl.”), ¶ 16 (claiming “an  
11 average of 10 minutes per day and 50 minutes per week” during bag checks) to Ex. YY, 88:17-22  
12 (stating at least 50% of the time a bag check lasted only 30 seconds.)

13 And, while Plaintiffs suggest there are conflicts only between their witnesses’ estimates of  
14 time spent in bag checks on the one hand and Apple’s managerial witnesses on the other, (Pl.,  
15 Motion, 9:11-18), there are similar discrepancies between the time estimates of Plaintiffs’ witnesses  
16 and Apple’s non-managerial witnesses who testified they never wait more than a few seconds for a  
17 bag and/or technology check. (*E.g.*, Ex. A-37, ¶¶ 12, 13; Ex. A-26, ¶¶ 9-10; Ex. A-15, ¶ 11.)

18 In short, even if the time at issue were potentially compensable (which, again, Apple denies),  
19 Apple still would have no obligation to pay unless the specific employee spent more than a *de*  
20 *minimis* amount of time in a particular bag or technology check. But substantial evidence shows that  
21 there is no common evidence to establish whether a particular check, if any, took more than a *de*  
22 *minimis* amount of time. Thus, individual issues of liability will overwhelm any common issues.

23 **E. Individualized Questions Predominate As To Whether Employees Were On Or**  
24 **Off The Clock For A Bag Or Technology Check**

25 To the extent an employee brought a bag or personal Apple technology and participated in a  
26 bag or technology check on a particular day, and that duration was more than *de minimis*,

27 <sup>11</sup> Where video evidence exists that contradicts a party’s version of the story such that no reasonable  
28 jury could believe it, the court must view the facts “in the light depicted by the videotape.” *Scott v.*  
*Harris*, 550 U.S. 372, 380-81 (2007).

individualized questions predominate regarding whether the employee was on or off the clock for that check. As noted above, Plaintiffs assert “Apple does not compensate many Apple employees for checks.” (Pl. Motion, 10:6 (emphasis added).) Again, that necessarily means that some bag checks and/or technology checks are compensated. (See Ex. WW, 15:15-17; Ex. B-4, ¶¶ 25-26; Ex. B-11, ¶ 35; Ex. XX, 85:4-8.) Plaintiff Speicher admitted it would have been an option for her to wait to clock out until after she had gone through a bag or technology check. (Ex. TT, 119:14-20.) This is particularly true at stores with remote break rooms with time clocks, because employees could leave their bags or devices in lockers in the remote break rooms avoiding checks altogether and/or clock out at those locations after any check in the store was completed. (See, e.g., Ex. OO, 262:18-264:18; Ex. B-16, ¶ 9; Ex. B-10, ¶ 42; Ex. B-5., ¶ 29; Ex. B-15, ¶ 23.)

In sum, given the myriad individualized inquiries required to determine liability, class certification must be denied. See *Ogiamien*, 2015 U.S. Dist. LEXIS 22128, at \*12-13; *Quinlan*, 2013 U.S. Dist. LEXIS 164724, at \*11.

#### VI. RULE 23(C)(4) IS NOT APPLICABLE

Even if Plaintiffs had satisfied Rules 23(a) and (b), which they did not, certification of “particular issues” under Rule 23(c)(4) would not be appropriate. Plaintiffs seek to certify five “common questions” that purportedly relate to Apple’s liability for bag checks and technology checks, but these “common questions” do not generate common answers and, in any event, they still do not answer the question of Apple’s liability. (See Pl. Motion, 18:27-28 (referring to “Questions One, Two, Three, Four and Thirteen”).)

Answering Questions One through Four would not result in a common liability finding. Question One asks “Did Apple have a written policy regarding Checks that applied to Apple Employees at California Stores during the Class Period?” (Pl. Motion, 18:5-6.) As set forth above in Section II(C), Apple did have a written policy regarding bag checks and technology checks, but the policy’s application, if any, on a particular employee varied by store, by time, and by employee (e.g., did the employee even bring a bag to work). As this Court observed in its ruling, “[t]he record in this action . . . involves many varying fact patterns and lends itself to a myriad of different interpretations of Apple’s policy and practice regarding when an employee is required to undergo a

1 security screening.” (May 30, 2014 Order, 5:9-12 (emphasis added).) Similarly, Question Three  
 2 asks “What did Apple tell Apple Employees about how and when the policy should be enforced?”  
 3 (Pl. Motion, 18:7-8.) Again, as set forth in Section II(C), there is no common answer to this  
 4 question because Apple empowered its Store Leaders to decide whether and how to implement the  
 5 policy, and each Store Leader implements the bag and technology check policy as he or she sees fit.  
 6 Thus, there are no common answers to these questions.

7 Question Thirteen asks “Were Apple Employees who went through Checks subject to  
 8 Apple’s ‘control’ for purposes of imposing liability under California law?” (Pl. Motion, 18:19-21.)  
 9 Apple’s position is that employees are not under its control because they may avoid checks simply  
 10 by not bringing bags or personal Apple technology into work (and understood that if they chose to  
 11 bring a bag to work that that bag may be subject to a reasonable search). Indeed, this Court  
 12 previously indicated that liability may depend on whether “Apple employees may need to bring a  
 13 bag to work for reasons they cannot control, such as the need for medication, feminine hygiene  
 14 products, or disability accommodations.” (May 30, 2014 Order, 7:23-25.) Thus, to answer  
 15 Plaintiffs’ proposed Question 13, liability necessarily requires an individualized inquiry to prove: (1)  
 16 an employee carried a bag on a particular day; (2) that bag contained a “necessity of life”; (3) that  
 17 bag was checked; (4) the check was more than *de minimis*; and (5) the check was off-the-clock.  
 18 There are no common answers to these questions that could establish liability on a class-wide basis.

## 19 **VII. PLAINTIFFS’ PROPOSAL FOR 12,400 MINI-TRIALS IS NOT A VALID CLASS** 20 **ACTION TRIAL PLAN**

21 Plaintiffs’ proposed trial plan, (Pl. Motion, 23:1-25:16), is moot because Plaintiffs failed to  
 22 establish the required elements for class certification.<sup>12</sup> Furthermore, Plaintiffs’ proposed trial plan  
 23 is invalid because it is contingent upon the appointment of special masters to adjudicate “issues  
 24 relating to liability and damages” for the 12,400 putative class members’ individual claims, (Pl.  
 25 Motion, 2:12-13; see also Pl. Motion, 24:16-18 (“Plaintiffs will request appointment of one special  
 26 master from each California district . . . to adjudicate the claims of individual Class members who

27 <sup>12</sup> Plaintiffs’ 24-page “trial plan,” Shalov Decl. Ex. 83, is an improper supplemental brief that  
 28 violates Local Rule 7-2. If the Court is inclined to consider Plaintiffs’ separate proposed trial plan,  
 Apple respectfully requests an opportunity to file a separate response to it.

1 have not opted-out of the Class.”.) But the use of masters here is inappropriate as a matter of law.

2 Special masters may be used only in truly exceptional conditions to aid judges in the  
3 performance of specific judicial duties, not to displace the court. *See La Buy v. Howes Leather*  
4 *Company*, 352 U.S. 249, 256 (1957); *Burlington Northern R.R. Co. v. Dept. of Rev. of State of*  
5 *Wash.*, 934 F.2d 1064, 1071 (9th Cir. 1991). Court congestion, complexity of the case, and an  
6 anticipated lengthy trial do not constitute exceptional conditions. *La Buy*, 352 U.S. at 256-258.  
7 Under Rule 53, a court may appoint a special master only to: (a) perform duties consented to by the  
8 parties; (b) hold trial proceedings and make or recommend findings of fact on issues to be decided  
9 by the court without a jury if appointment is warranted by some exceptional condition, or the need to  
10 perform an accounting or resolve a difficult computation of damages; or (c) address pretrial and  
11 post-trial matters that cannot be addressed effectively and timely by an available district judge or  
12 magistrate judge of the district. Fed. R. Civ. P. 53(a)(1). None of these grounds exist here.

13 First, Apple does not consent to the use of special masters. Second, special masters may not  
14 be appointed where, as here, all issues of fact must be decided by a jury. Fed. R. Civ. P. 53(a)(1)(B)  
15 (permitting appointment only on “findings of fact on issues to be decided without a jury”); Adv.  
16 Comm. Notes to 2003 Amendments to Rule 53(a)(1) (“Rule 53 continues to address trial masters as  
17 well, but permits appointment of a trial master in an action to be tried to a jury only if the parties  
18 consent.”); (Consolidated Complaint, Dkt. No. 220, p. 21 (“Pursuant to Federal Rule of Civil  
19 Procedure 38(b), Plaintiffs demand a trial by jury of all issues so triable.”). And third, the proposed  
20 mini-trials of Apple’s alleged liability to each putative class member are not pretrial or post-trial  
21 matters – they are the trials themselves. Accordingly, appointment of four special masters to preside  
22 over 12,400 mini-trials is not permitted. Regardless, Plaintiffs’ mini-trial proposal is unmanageable.  
23 Even if the Court presided over 3 trials a day, it would take 4,133 days to complete them all.

## 24 **VIII. CONCLUSION**

25 For the reasons set forth above, Plaintiffs have admittedly failed to meet their burden to  
26 establish all elements necessary for class certification. Plaintiffs' motion should therefore be denied.

27 Dated: May 28, 2015

//s// Julie A. Dunne

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